



Personal Injury and Medical Law Teams Case Note

Crofton (a patient suing by his father and litigation friend, John Crofton v NHSLA

[2007] EWCA Civ 71, [May, Dyson, Smith LJJ]¹

The Claimant suffered brain damage shortly after his birth in July 1979 that had rendered him severely disabled. At trial he was living in supervised accommodation where his carers were paid for by the local authority. The trial judge accepted that damages for future care should be assessed on the basis that it was reasonable for him to purchase his own accommodation and employ carers but decided that the local authority would make yearly direct payments towards care costs, which should be offset against the total care costs. In considering for how long the direct payments from the Local Authority would be made, a full life multiplier was applied.

The issue of direct payments² had not been part of the Defendant's case but had been raised during evidence-in-chief by a local authority employee. He had not been cross-examined on this as the Claimant's counsel had no material upon which to do so [paragraph 29 and 30]. Moreover, the Claimant's counsel thought that the evidence went to 'top-up' provision (as per Sowden) and not the separate issue of whether direct payments would continue to be made for continuing care in a domiciliary setting [paragraph 44]

The Claimant appealed

Held: Appeal allowed with remission to the judge of quantification of the direct payments issue.

The Court carried out a detailed review of the relevant statutory provisions including sections 21 and 29 National Assistance Act 1948, section 2(1) Chronically Sick and The Disabled Persons Act 1970, section 47 National Health Service and Community Care Act 1990, the Fairer Charging Policy guidance and Charges for Residential Accommodation Guidance ("CRAG")

¹ See 13 KBW PIMLU April 2006, pages 17 to 19 detailed digest and comment on the first instance decision and September 2006. This Casenote should also be read in conjunction with the digest and analysis of **R (on the application of his litigation friend) v Criminal Injuries Compensation Appeals Panel** [2007] EWHC 180 (Admin) Langstaff J in the 13 KBW February 2007 PIMLU, pages 8 to 11

² Section 57 of the Health and Social Care Act 2001 makes provision for persons assessed as needing community care services by assessment under section 47 of the NHSCCA [National Health Service Care in the Community Act which includes services provided pursuant to section 20 of the National Assistance Act] to receive direct payments from the local authority

The issues are identified at paragraph 27 of the judgment of Dyson LJ:

1. whether the judge should have allowed the respondent to raise the issue of direct payments at all?
2. whether the local authority could be satisfied, the Claimant having been awarded substantial damages, that it was necessary to meet his care needs under the National Assistance Act 1948 s.29 and the Chronically Sick and The Disabled Persons Act 1970 s.2 by making direct payments? This divided into two stages:
 - a. The *threshold question*: can the local authority be satisfied that it is necessary for it to meet the care needs of the claimant?
 - b. If so whether at the *means testing stage* a local authority can have regard to the damages in deciding what direct payments to make in order to meet the person's needs?
3. whether, if the local authority would make direct payments to C, that fact was properly taken into account by the judge in his assessment of damages

The Court was unanimous in holding:

- 1) It was most unfortunate that the direct payments issue arose in the way it did, but the judge had been correct to allow the respondent to take the point, given its importance and potential impact on the amount of the award. However, the decision to allow the point to be taken at the time, rather than following an adjournment, had resulted in unfairness and an important lacuna in the evidence necessary for the judge's decision, Sowden v Lodge (2004) EWCA Civ 1370 , (2005) 1 WLR 2129 considered [paragraph 44]

“What occurred in this case proves the wisdom of the remarks made by all three members of this court in Sowden. The springing of surprises is anathema to modern case-management. This is what happened in this case. To raise an important and difficult issue in the way that the direct payments issue was raised was an unacceptable way to conduct litigation. We do not criticize either [the Claimant's counsel] or the judge but can now be seen that the right course would have been to adjourn the issue to enable [the Defendant's counsel] to formulate it properly and for [Claimant's counsel] to consider it fully” [paragraph 45]

- 2) The confusion and apparent contradictions in the 1948 National Assistance Act and the 1970 The Disabled Persons Act were considered at length. Dyson LJ concluded that while it was striking that there was no provision in s.29 of the 1948 Act or in s.2 of the 1970 Act which corresponded to s.21(2A) and s.22(5) of the 1948 Act, that did not mean that in the interpretation of these provisions it was necessary to infer that Parliament intended that an award of damages for personal injury should be disregarded at the threshold stage in relation to s.21 of the 1948 Act, but taken into account in relation to s.29 of the 1948 Act and s.2 of the 1970 Act at the means testing stage. To conclude otherwise would be illogical [paragraphs 48 to 73]..

- 3) In this regard, assistance could be derived from the guidance issued by the Department of Health in September 2003 as to the exercise of discretion under the Health and Social Services and Social Security Adjudications Act 1983 s.17 [HSSSSAA]. This guidance provided that the capital value of personal injury damages administered by the Court of Protection was to be disregarded in the means testing exercise. [paragraph 57]
- 4) The court addressed certain anomalies that appeared to arise in applying the various sections of the relevant legislation and departmental guidance in relation to what capital should be taken into account at the threshold stage:
- a. In R v Sefton MBC, Ex p Help the Aged (1998) 38 BMLR 135³ a three stage test was extrapolated to be applied at the threshold stage:
 - i. The council must first assess the individual needs of the person
 - ii. Decide whether it is necessary to make arrangements to meet those needs (e.g. whether these are being met by a friend or relation or from the person's own pocket)
 - iii. If so, make arrangements to meet those needs
 - b. Section 21 (2A) and (2B) of the 1948 National Assistance Act (inserted by the Community Care (Residential Accommodation) Act 1998 following R v Sefton Metropolitan Borough council, ex parte Help the Aged⁴ deals with the provision of accommodation and requires a threshold test to be carried out in which the capital sum represented by an award of damage is disregarded [paragraph 57].
 - c. Where a claimant was awarded damages for personal injury that were administered by the Court of Protection, the sum awarded and any income from it were disregarded at the threshold stage (section 22(4) Assessment of Resources Regulations): the sums could not be taken into account for the purposes of deciding whether the claimant was in need of care and attention which was not otherwise available [paragraphs 58 59 and 73]. Bell v Todd and Ryan v Liverpool Health Authority [2002] Lloyds LR Med 23 distinguished.
 - d. There were obvious policy reasons for ring-fencing a person's personal injury damages where he is under a disability (and his funds have to be administered by the Court of Protection). However no policy reason had been suggested to justify ring-fencing such a person's personal injury damages in relation to the cost of care and attention in local authority accommodation but not in relation to the cost of meeting such a person's care needs in his own home [paragraph 62].

³ also reported at [1997] 4 All ER 532)

⁴ where an unreasonable threshold of £1500 capital had been imposed by the local authority below which an individual would be considered to be eligible for financial assistance, whereas section 21 and the Assessment of Resources Regulations provided for capital under £10,000 to be disregarded in determining a person's ability to pay for accommodation provided under section 21 and once capital fell below £160,000 the local authority became under an obligation to provide assistance. Lord Woolf MR held that the authority was not entitled to provide its own scale [paragraphs 51 to 53]

- e. It was difficult to see why personal injury damages should be left out of account when deciding whether care and attention is to be regarded as "otherwise available" (the section 21 question at the threshold stage) and yet taken into account at the means testing stage when deciding whether it is necessary to provide welfare services to meet a person's care needs (the section 29/section 2(1) [Chronically Sick and The Disabled Person Act 1970] question) [paragraphs 66 and 67].
- f. If personal injury damages are taken into account, undesirable distinctions could arise such as the situation where A uses his damages to fund the purchase of care services to meet his needs but B does not. In the latter circumstances the local authority would be required to fund B's care because he met the 'needs' test and at the means testing stage would not require B to use his funds to pay for the care under the Fairer Charging Policy whereas A would never reach the means testing stage until he exhausted his damages

Accordingly, a local authority, in deciding the threshold question, was obliged to disregard personal injury damages administered by the Court of Protection [paragraphs 66 to 72].

- 5) As to the means testing stage, unlike section 21 where the ring-fencing of damages and income arising from damages is provided for by statute and statutory instrument, the framework of section 29 of the National Assistance Act 1948 is different and gives a discretion to the local authority to decide what to charge in accordance with the guidance in the Fairer Charging Policy [paragraph 76]. However,
 - a. that Fairer Charging Policy provides that the capital value of personal injury damages administered by the Court of Protection is to be disregarded in the means testing exercise in that no distinction is drawn within the provisions of this policy between "savings" and "capital"; there is also provision that the main residence occupied by the user should not be taken into account "but other forms of capital may be taken into account, as set out in CRAG". The court interpreted this as meaning that the CRAG rules in their entirety are imported into the means assessment stage and since CRAG stipulates that certain items of capital are to be disregarded, then the Fairer Charging Policy requires local authorities to exercise their discretion in the same way [paragraph 77].
 - b. Similar interpretations were placed on the CRAG guidance in relation to funds from personal injury damages held in trust or administered by the court: these sums would be left out of account [paragraph 78]

Accordingly personal injury damages would also be disregarded at the means testing stage

- 6) The position regarding income deriving from capital was far from clear: Freeman v Lockett (2006) EWHC 102 (QB), (2006) PIQR P23 considered where Tomlinson J concluded it was a "moot point" whether the provisions in CRAG which deal with income are intended to be applicable by incorporation into the domiciliary care regime and was left in doubt as to the position concerning income accruing on

capital deriving from a personal injury award, whether the sums are held on trust or otherwise. The court considered that in the exercise of the Fairer Charging Policy the Council had a discretion as to how it would treat income derived from the C's damages. The evidence before the Judge in the present case was that a move from residential to C's own home would not affect the local authority provision since it would still have a responsibility to provide for the C's assessed needs and that these needs would not change because of a change of setting [paragraph 85].

- 7) The judge had not had sufficient material before him to enable him to decide whether the income would be taken into account by the local authority, and the instant court was in no better a position to do so. [paragraph 86]
- 8) Nonetheless, payments by third parties which a claimant would not have received but for his injuries have to be taken into account in carrying out the assessment of damages unless they come within one of the established exceptions. Otherwise the claimant will enjoy double recovery. This does not prevent a claimant withdrawing an application for funding through a wish to rely exclusively on public funding of care (as was the position in Freeman v Lockett).
- 9) There will be cases where the possibility of a claimant receiving direct payments is so uncertain that they should be disregarded altogether in the assessment of damages but where a court finds that a claimant will receive direct payments for at least a certain period of time and possibly much longer, this funding must be taken into account in the assessment. The correct way to reflect the uncertainties to which Tomlinson J referred in Freeman v Lockett is to discount the multiplier [paragraph 96]. Accordingly, the judge had been correct to find that the local authority could and would make direct payments to The Claimant despite the award of damages. It follows therefore that in the assessment of damages the court had to take into account those local authority payments.
- 10) The judge found that the local authority in C's case would regard the care package provided in residential care as the appropriate and adequate package, rather than the more extensive package envisaged by the C's advisers to be required in a domiciliary setting. A 'topping-up situation therefore arose and in this regard the Claimant was concerned that the judge's decisions was flawed as to the number of hours and hourly rates to be covered by the direct payments and the period over which this would be paid, contending he had insufficient evidence upon which to make his findings on these issues. The Court of Appeal agreed and the direct payments issue would be remitted to the judge for further consideration of these matters.
- 11) The judge had also erred in applying the agreed whole-life multiplier to the direct payments. He had identified various uncertainties regarding the security of funding for direct payments including the period over which direct payments would be made; those uncertainties should have led him to conclude that a substantial discount to the multiplier was necessary and the case would be remitted for determination of the appropriate multiplier. Godbold v Mahmood [2005] EWHC 1002 (QB) Mitting J considered as well as Tomlinson J in Freeman v Lockett [paragraphs 106 to 109]

Comment: This long-awaited decision is likely to raise as many arguments as it resolves since the Court of Appeal has made it clear that the *ratio decidendi* of its ruling on direct payments was the lack of adequate information before the trial judge and his failure to adjourn so that the necessary evidence could be adduced by both parties.

Nonetheless, three clear principles emerge:

- (i) The local authority is not entitled to take account of damages (capital or income) in determining the threshold question⁵. This issue was not raised at all before the judge but the Court of Appeal rightly took the opportunity to consider and rule upon this important issue [paragraph 48]. In so doing, the Defence were criticised for the late manner in which this matter was introduced:

“What occurred in this case proves the wisdom of the remarks made by all three members of this court in *Sowden*. The springing of surprises is anathema to modern case-management. That is what happened in this case. To raise an important and difficult issue in the way that the direct payments issue was raised was an unacceptable way to conduct litigation. We do not criticize either [Counsel for the Claimant] or the Judge but it can now be seen that the right course would have been adjourn the issue to enable [Counsel for the Defendant] to formulate it properly and for [Counsel for the Claimant] to consider it fully” [paragraph 46]

- (ii) Had the judge been properly addressed on the issue of direct payments, these could have been taken into account and offset against damages. It will be recalled that the judge in *Freeman v Lockett* was similarly handicapped in terms of the evidence before him – a point that did not escape the Court of Appeal. Clarity on this vital issue therefore has been provided

- (iii) The burden of adducing such evidence is upon both parties although primarily upon the Defendant:

Contrast the position in *Sowden* where the Court of Appeal made it very clear that the burden of proving the availability of local authority funding was firmly upon the Defendant although it would be prudent for Claimants to call evidence as to why statutory provision is inadequate⁶.

The principle to be extrapolated from *Crofton* therefore is that provided sufficient evidence is before the court that direct payments are or will be made, they will be taken into account by the court in the assessment of future loss claims with the uncertainty as to their continuation being taken into account by a reduced multiplier. This is analogous to statutory benefits and health charges being clawed back recouped and reference was made to this in paragraph 90]

⁵ although the position regarding income as opposed to capital is less clear from analysis of the relevant statutory provisions

⁶ *Sowden* at [63], [84-85], [99]

One particular concern must be that, unlike historically paid benefits, if such direct payments cease, this does not amount to not a 'deterioration' in the Claimant's condition that will trigger re-consideration of the damages award under a variable periodical payments order⁷. Nonetheless the withdrawal of such direct payments (the payment of which the Claimant is unable to control) could have serious repercussions in terms of his future care and breach 'the 100% principle' which played an important part in the reasoning of Swift J in Thompstone v Tameside & Glossop Acute Services NHS Trust [2006] EWHC, concerning appropriate indexation of periodical payment orders⁸.

By contrast, in Tinsley v Sarkar [2006] PIQR Q1 and Walton v Calderdale Healthcare NHS Trust [2005] EWHC Silber J⁹ (LTL 25.05.05) the court's reasoning in making a full award in respect of care, was that there was no clear indication in the legislative regime that the local authority would not take account of the 'top-up' payments in determining whether it was required to provide services¹⁰

As to claims by minors, the situation is even more fraught because of the increased speculation and hypothesis inherent in crystal-ball gazing that far into the future: local practices may mean that direct payments may be refused by one local authority yet made by another and this could affect a Claimant who subsequently moves to an area where the local authority is less prepared to make direct payments; equally a future Government may legislate that local authorities *should* take account of damages to ensure that the tortfeasor meets the total cost of provision and not cash-strapped local authorities. What then should be the position? This clearly troubled Tomlinson J in Freeman v Lockett where he referred to the "fragility" of the policy from which the right to receive direct payments derived for domiciliary care, observing that:

"in the ordinary way [this regime] is very much more vulnerable to adjustment in order to save costs than is the direct provision of residential care" [paragraph 38 of his judgment].

In A (a child suing by his father and litigation friend C) v B Hospitals NHS Trust [2006] EWHC 1178 (QB), Lloyd Jones J, it was suggested that the way forward would be for a reverse indemnity by the Claimant whereby the Claimant recovers care costs in full and agrees to repay the amount of public funding s/he receives. This was done in Croxford v Brighton and Sussex University Hospitals NHS Trust (2005) (unreported) where a head injury claimant was offered an indemnity for the costs of providing care should the existing provision be withdrawn or no longer provided on the current financial basis.

To hold otherwise i.e. an indemnity by the defendant to guarantee any shortfall in future public funding places onerous demands on the Claimant since this exposes the Claimant and his carers to exhausting and exhaustive annual applications for local authority

⁷ see generally PD 41B; the Damages (Variation of Periodical Payments) Order 2005 Explanatory Note 357; s.2B The Damages Act 1996 that allows variation of a PPO in certain circumstances which include a "significant medical improvement/deterioration in the claimant's condition"

⁸ see 13 KBW PIMLU, November 2006, pages 12 to 13 and the **13 KBW PI and Medical Law Team Casenote** on this decision and subsequent developments by The Deirdre Goodwin and available either on application to the Clerks or by downloading this from the 13 KBW website: URL: http://www.13kbw.co.uk/new/members/member-details.asp?member=Deirdre_Goodwin

⁹ both decisions digested and commented on in the 13 KBW May 2005 PIMLU at pages 8 to 10

¹⁰ Tinsley at [122-126]

provision with the Defendant only making provision in the event that this provision is refused, or (as inevitably is the case) where there is a shortfall in such provision from the level of care approved by the court¹¹. Moreover the application procedure is obscure and labyrinthine whereas the notification to and subsequent recovery by the Defendant of indemnity from the new Court of Protection should be a relatively straight-forward process.

In Crofton the problem is further compounded in that liability has been compromised as to 67.5% in the Claimant's favour which means that any damages' award will not by itself provide adequate funding for future care such that there will always be a shortfall. The difficulty caused by such apportionment or similar is likely to arise in many of these high value claims, and owing to inadequate evidence on the 'direct payments' issue, this appellate decision has not been able to provide the clarity and guidance that many practitioners had hoped for.

In this regard, the Court was clearly troubled by two matters which it considered require urgent legislative attention:

- 1) the 'windfall' this decision provides to Defendants:

"It does not seem right, particularly where the care costs are very large, that they should be met from the public purse rather than borne by the tortfeasor"
[paragraph 88]

Reference was made to Longmore LJ's observation in Tinsley v Sarkar [2005] EWHC 192 (QB) where he referred to the:

"instinctive feeling that, if no award for care is made because it will be provided free by the local authority, the defendant and his insurers will have received an undeserved windfall"

and that to satisfy this "instinctive feeling" a change in the law would be necessary. As this is essentially a political question [paragraphs 89 and 90]

- 2) The current state of social security law, expressing:

"dismay at the complexity and labyrinthine nature of the relevant legislation and guidance, as well as (in some respects) its obscurity. Social security law should be clear and accessible. The tortuous analysis in the earlier part of this judgment shows that it is neither. We would endorse the criticisms made by Stanley Burton J in Bell v Todd,... and Ryan v Liverpool Health Authority [2002] Lloyds LR Med 23

It is to be hoped that Parliament will respond to these clearly voiced concerns.

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Please note that this Case Note is intended to provide a summary and comment of the subject matter covered. It is not intended to be comprehensive or to provide legal or other professional advice.

¹¹ see 13 KBW PIMLU, September 2006, pages 30 to 32 where this case is digested and commented upon by reference to the first instance decision in Crofton where the Defendant had offered a similar indemnity against any future withdrawal in funding